No. 94-67

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

PAMELA REED,

Petitioner,

v.

DELTA AIR LINES, INC.,

Respondent.

On Petition For Writ Of Certiorari
To The Sixth Circuit Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether certiorari should issue to the Sixth Circuit in this case, which presents issues of Tennessee state law only, where the court below applied clear precedent of this Court, without any conflict with other Circuits, in holding that agency principles determine when an employer is liable for a sexually-hostile working environment allegedly created by its supervisor.

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Respondent respectfully prays that the Petition for Writ of Certiorari be denied.

STATUTES INVOLVED

The only statute involved is the Tennessee Human Rights Act (Tenn. Code Ann. § 4-21-401 (1991)), which provides in relevant part as follows:

(a) It is a discriminatory practice for an employer to:

> (1) Fail or refuse to hire or discharge any person or otherwise to discriminate against an individual with respect to compensation, terms, conditions or privileges of employment because of such individual's . . . sex. . . .

STATEMENT OF THE CASE

This is an action for alleged sexual harassment in the workplace under the Tennessee Human Rights Act. Petitioner, Pamela Reed, seeks to hold Respondent, Delta Air Lines, Inc.[1] ("Delta"), liable for the alleged actions of her former supervisor, Mr. Shan Harris. Although Ms. Reed's Statement of the Case is accurate to some extent, it contains certain misstatements or omissions, which Delta discusses below.

First, Ms. Reed asserts that she suffered a "continuous and prolonged period of sexual harassment" by Mr. Harris. Brief of Petitioner, p. 4. That is a gross overstatement. In reality, she alleges that sometime between 1980 and 1982, Mr. Harris kissed her on the cheek while she was in a stock room. By her own admission, he did not touch her again until 1991, although she claims that he sporadically made certain sexually-related comments (discussed below) during that approximately ten-year period, about which she registered no complaints with Delta management.

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[1] As required by Supreme Court Rule 29, Delta states that it has no parent companies and no non-wholly owned subsidiaries.

Next, Ms. Reed repeats the assertion made below that the two male supervisors who counseled her about the stock room kiss, Messrs. Agee and Patterson, told her that if she ever said anything like that again, it would be grounds for dismissal. *Id.* at 5. Although Ms. Reed acknowledges that these two supervisors were "eventually rotated from the Knoxville office" (*id.*), she neglects to state where these gentlemen fit within the management structure or that, soon after this incident, female management took over. At the time of the stock room kiss, both Mr. Patterson and Mr. Agee were Reservation Sales Supervisors, who in turn reported to Reservations Sales Manager of the Knoxville office, Sam Peters. Reed Depo., pp. 47-48; Howington Aff., ¶ 3. Ms. Mary Howington replaced Mr. Peters on June 1, 1981. Howington Aff., ¶ 2.

Neither Ms. Howington nor Ms. Freshwater, Ms. Howington's immediate subordinate and the Chief Supervisor over Mr. Harris, ever made comments to Ms. Reed like those allegedly made to her by the two males, and never suggested they would not be receptive to complaints from her. In fact, Ms. Reed felt that she could talk freely with Ms. Howington and Ms. Freshwater, and she often did. Reed Depo., pp. 49-51.

Ms. Reed also omits certain other, very important facts that were available to the courts below. For example, Delta's "Standard Practice" contains a written statement prohibiting sexual harassment. Howington Aff., ¶ 4 & Howington Aff. Exh. 1. Ms. Reed knew that Delta's Standard Practice Manual was available for her review in the manager's or the manager's secretary's office, and she had from time to time reviewed it when she wanted to know Delta's policy on a subject. Reed Depo., pp. 51-52.

Ms. Reed also knew of Delta's "Open Door Policy." This policy, in Ms. Reed's words, is one that gives any Delta employee the opportunity to make an appointment to see any member of management about any problem that he or she may be experiencing. *Id.* Indeed, Ms. Reed admitted that she had conversations with Ms. Howington and Ms. Freshwater concerning complaints about various things that supervisors had done. *Id.* at 49. Moreover, Ms. Reed had no difficulty talking with either Ms. Howington or any of the supervisors about problems that she had at work. *Id.* at 50.

Despite her contention in this Petition that she was forced to endure years of harassment, Ms. Reed did not complain to any co-worker or to any supervisor about Mr. Harris's alleged offensive, sexually-related comments during this ten or eleven year time frame. *Id.* at 79. Moreover, she could not recall any specific conversation with Mr. Harris in which she either told him that his alleged comments were offensive or asked him to stop. *Id.* at 77-78.[2]

Ms. Reed next makes the baseless accusation that Ms. Howington and Ms. Freshwater had a "lax attitude regarding sexual harassment." Brief of Petitioner, p. 5. She also contends that at no time was anyone told to stop off-color jokes and what she describes as "sexually provocative incidents." *Id.* at 5-6.

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[2] Ms. Reed also testified that some of her co-workers occasionally made offensive, sexually-related comments to her and to others. Reed Depo., pp. 65-73. She made no complaints to a supervisor about these alleged statements, either. *Id.* at 79.

Because *no one ever complained* about the atmosphere in the reservation sales office, there was no reason for a management reaction. Indeed, the off-color jokes and incidents described by Ms. Reed, many of which were not directed at her, not committed by Mr. Harris, or exaggerated by her, apparently were not deemed "unwelcome" by anyone, including Petitioner, since no complaints were registered. Moreover, she often was a participant in these activities.[3]

Petitioner lists five incidents that she contends shows Delta's alleged failure to take action to end a hostile environment. The first incident she lists involved Ms. Diane Jordan. Brief of Petitioner, p. 5. In her deposition, however, Ms. Jordan testified that she was not offended by the balloons Ms. Reed describes in her Brief, and she did not complain about them. A14.

With regard to the second incident, *i.e.*, Mr. Harris's reference to certain females as having "bodacious ta-tas" (Brief of Petitioner, pp. 5-6), the District Court found that the comments were not reported as offensive by anyone. A14. Indeed, Ms. Freshwater testified that Mr. Harris used the phrase in a joking manner; it was not addressed to anyone in particular; and was spoken in a relaxed, social setting. *Id.*

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[3] Ms. Reed does not deny that she made sexual comments in a kidding manner during this time period. Reed Depo., p. 64. She admits that she laughed at sexually-related jokes that were told and possibly told some herself. *Id.* at 69. She also admits that it was common practice for employees to tell jokes of a sexual nature in the reservation office; that she participated in these joke-telling sessions; and that she did not find them offensive. *Id.* at 69-70, 73-74.

Ms. Reed overstates her case in the third incident listed when she asserts that Mr. Harris made sexually explicit statements about oral sex "every time" he walked into the common area of the office. Brief of Petitioner, p. 6. Ms. Reed actually testified that, during the ten or eleven year period after the alleged stock room kiss, on four or five occasions, Mr. Harris asked her and an assembled group of reservation sales agents, "Who is going to give me a blow job this morning?" Reed Depo., pp. 57-59. Ms. Reed offered no testimony to corroborate this assertion.

Petitioner's attempt to paint sporadic events as continuous and exaggerate her actual testimony is exemplified in the fourth claimed incident. She asserts that Mr. Harris asked various women if they resembled women modeling underwear in various magazines. Brief of Petitioner, p. 6. Petitioner actually testified that Mr. Harris occasionally picked up catalogs or magazines and made comments about the women's underwear displayed therein. Reed Depo., p. 58. Ms. Reed states that some of those comments were directed at her and some were directed at others. *Id.* at 59. In one instance, Ms. Reed claims that Mr. Harris picked up a *Vogue* magazine and said that he thought Ms. Reed resembled a woman in an advertisement. *Id.* at 60. Ms. Reed did not tell Mr. Harris to stop. Instead, she testified that her way of telling Mr. Harris that she found that comment offensive was to look at him in a disgusted manner, turn around, and go back to work. *Id.* at 61, 77.

The fifth incident Ms. Reed describes, in which Mr. Harris allegedly placed his hands on her buttocks (Brief

of Petitioner, p. 6), was simply not something Delta management could have observed; because, if it occurred, it occurred privately, behind closed doors between Ms. Reed and Mr. Harris, and she did not report it. Reed Depo., pp. 95-97. Ms. Reed's attempt to make the facts appear more egregious by lumping a secret encounter such as this together with the sporadic jokes and comments which occurred in the office's common areas over an alleged ten or eleven year period should be rejected. Management cannot have been and was not on notice about "touching" which it did not see, and which she did not report.

Ms. Reed would have this Court believe that the sporadic, unconnected statements or incidents she describes in her Petition ultimately "culminated" in a 1991 sexual assault against her by Mr. Harris. Brief of Petitioner, p. 6. In reality, the sexual assault (if it occurred) went well beyond anything that had allegedly happened before. Although Ms. Reed repeats here her version of what happened "behind closed doors" between Mr. Harris and her on Labor Day weekend 1991, she neglects to mention that she did not report this alleged incident until October 1991.

As soon as Ms. Reed reported the Labor Day weekend incident, Delta suspended Mr. Harris and investigated her allegations by interviewing both Ms. Reed and Mr. Harris. Ms. Reed testified that Ms. Howington was very receptive to her and wanted to know the facts. Reed Depo., pp. 119-20. Although the investigation revealed

conflicting stories,[4] Delta terminated Mr. Harris, a 23-year employee, on October 21, 1991. It is undisputed that Delta took prompt remedial action to end the alleged sexually-hostile working environment as soon as Ms. Reed complained.

Finally, Ms. Reed claims that, upon her return to work after the termination of Mr. Harris, her co-workers were "extremely hostile" to her. Brief of Petitioner, p. 7. As Ms. Reed candidly admitted in her Brief in the Sixth Circuit, she was not liked by her co-workers before she reported Mr. Harris's alleged misconduct. She had no reason to expect her popularity to improve afterwards. Finally, the fact that she was not liked by her peers has nothing to do with the *sexual* harassment claim she makes here. A28.

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[4] Mr. Harris, who no longer works for Delta, testified that Ms. Reed was a flirt who talked constantly about her sexual relationships. Harris Depo., pp. 34-37. He stated that she talked to him about her personal life, and even asked him on one occasion after she had implant surgery if he wanted to see her "new" breasts. *Id.* at 82-84. He also stated that Ms. Reed talked about her sexual activities a great deal. *Id.* at 88-93. He testified that all of the sexual activity between Ms. Reed and him was consensual, and that she had initiated it. *Id.* at 96-104. Finally, he stated that Ms. Reed would make comments about the anatomy and appearance of male Delta employees. *Id.* at 121.

SUMMARY OF THE ARGUMENT

This is not a proper case for grant of certiorari under Supreme Court Rule 10 because it was brought under Tennessee state law. There is no federal question presented in this case. The District Court and Sixth Circuit below merely looked to federal law in interpreting Tennessee law.

Even if the use of federal precedent presents an issue of federal law, there is no conflict either between the decision below and *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), or between the decision below and the opinion of any other federal Circuit Court of Appeal, including *Paroline v. Unisys Corp.*, 879 F.2d 100 (4th Cir. 1989), *vacated in part*, 900 F.2d 27 (4th Cir. 1990) (*en banc*). Instead, the Circuit Court decisions are in harmony with *Meritor's* directive that agency principles determine when an employer is liable for the sexually-hostile working environment created by its supervisor.

ARGUMENT

A. This State Law Case Is Not A Proper One For Certiorari

This case was brought under the Tennessee Human Rights Act, *not* federal law, and, as such, this is not the type of case this Court has defined as eligible for certiorari. *See, e.g.*, Sup. Ct. R. 10.

Petitioner argues that certiorari should be granted because the decision of the Sixth Circuit below is (1) in conflict with this Court's opinion in *Meritor Savings Bank*

v. Vinson; and (2) in conflict with the Fourth Circuit's opinion in *Paroline*. Brief of Petitioner, pp. 8, 12-14.

Even assuming the existence of the asserted "conflict,"[5] these arguments have no merit under the clear terms of Supreme Court Rule 10. First, Rule 10(1)(c), which deals with the grant of certiorari to a court of appeals that has brought itself into "conflict" with a Supreme Court decision, does *not* apply here. That provision applies only to instances where "a United States court of appeals . . . has decided a **federal question** in a way that conflicts with applicable decisions of this Court." Sup. Ct. R. 10(1)(c) (emphasis added).

No federal question was decided below. The case was not filed under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, but instead was filed in state court under the Tennessee Human Rights Act, and subsequently removed to federal court under diversity jurisdiction. The opinions below were based on state law, as mandated by *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), and merely used federal precedent under Title VII as a guide, because no Tennessee Supreme Court decisions apply the Tennessee Human Rights Act to the sexual harassment area.

It has routinely been this Court's practice, as stated in Rule 10, not to grant certiorari to review questions of state law such as those presented here. *See, e.g., Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983) ("We emphasize,

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[5] As Respondent will show *infra* at Argument B, there is no conflict between the decision below and a decision of this Court or between the decision below and *Paroline*.

however, that, standing alone, a challenge to state-law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review."); *Richards v. United States*, 369 U.S. 1, 16 n.35 (1962) ("We ordinarily accept the determinations of Courts of Appeal on questions of state law. . . . "); *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944) ("[O]rdinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts. . . . "). The Court should follow that practice here.

Likewise, Petitioner's second conflict argument makes the same mistake. Supreme Court Rule 10(1)(a) states that certiorari will generally be granted only when "a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter[.]" Because this case rests on Tennessee law, no other federal Circuit Court of Appeal has applied the Tennessee Human Rights Act in a contrary fashion.

Because her case does not fit within the provisions of Rule 10 she has advanced,[6] Petitioner may be seeking certiorari to review alleged errors by the courts below in assessing the undisputed facts and granting summary judgment to Delta under the Tennessee Human Rights Act. However, this Court uses its certiorari jurisdiction to

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[6] Petitioner has not argued, and could not support, the contention that certiorari would be proper under the two remaining grounds allowed in Rule 10 – Rule 10(1)(a) (departure from the accepted and usual course of judicial proceedings) and Rule 10(1)(b) (errors by state courts).

examine issues of Constitutional or federal statutory importance, not to engage in the correction of asserted errors in assessing evidence. *Texas v. Mead*, 465 U.S. 1041, 1043 (1984) (" 'We do not grant a certiorari to review evidence and discuss specific facts.' ") (quoting *United States v. Johnston*, 268 U.S. 220, 227 (1925)); *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review."); *General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 178 (1938) ("Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it."). But, that is precisely what Petitioner asks this Court to do. Because this Petition is not based on any of the grounds provided by Supreme Court Rule 10, it should be denied.

B. Certiorari Is Unnecessary Here Because The Sixth Circuit Below Applied Agency Principles As Directed By This Court Without Conflict With Any Other Circuit Court of Appeal

Even if this Court were to disregard the parameters of Rule 10 and consider the "merits" of her arguments, Petitioner's contentions that the decision below is in conflict with either *Meritor* or the Fourth Circuit's decision in *Paroline* are without merit. The Sixth Circuit correctly applied clearly existing precedent of this Court, and its decision is in harmony with other Circuit Courts of Appeal.

In *Meritor*, this Court noted that Title VII's language "evinces an intent to place some limits on the acts of

employees for which employers under Title VII are to be held responsible." 477 U.S. at 72. Accordingly, this Court directed lower courts to "look to agency principles for guidance in this area." *Id.*[7]

The Sixth Circuit's opinion below faithfully follows *Meritor*'s directive to apply agency principles to determine when an employer is liable for the harassing act of a supervisor. A25-27. But, in accordance with those principles, the court below stated that agency liability " 'is not strict and can be negated if the employer responds adequately and effectively once it has notice of the actions.' " *Id.* at A27 (quoting *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 184 (6th Cir.), *cert. denied*, 113 S.Ct. 831 (1992)). Because Delta took prompt, remedial action once Ms. Reed complained, the Sixth Circuit affirmed the District Court's decision that Delta was not liable for the alleged sexually-harassing acts of Mr. Harris. A28.

As the Petition correctly observes (pp. 13-14), the other Circuit Courts of Appeal are in agreement with the Sixth Circuit's application of *Meritor*. The only case Petitioner asserts is in "conflict" with the decision of the Sixth Circuit below (and the other Courts of Appeal) is the Fourth Circuit's *Paroline* decision.

However, Petitioner's claim of the existence of a conflict in the Circuits is incorrect. The difference in result

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[7] The existence of an adequate complaint procedure for employees to use if harassed and a failure to utilize it, though not necessarily dispositive, was "plainly relevant" to the *Meritor* Court. 477 U.S. at 72. Notably, the Court reversed the court of appeals' judgment that employers were always liable for sexual harassment by their supervisors. *Id.*

reached by the Sixth Circuit below and *Paroline* is caused by a difference in the facts, not a conflict in the rule of law applied. In *Paroline* the evidence showed that the employer had received complaints from some of its female employees about the harasser's misconduct before the plaintiff was hired, but took no adequate steps to stop it or prevent its reoccurrence. 879 F.2d at 107-108. Moreover, at the plaintiff's job interview, attended by a high-level manager, the harasser asked plaintiff inappropriate questions about sexual harassment in an effort to determine her willingness to tolerate it, and he then recommended that she be hired. *Id.* Finally, after plaintiff was hired, the harasser immediately made inappropriate comments and advances upon her, which she promptly reported. *Id.* at 103. However, management's inadequate reaction was to issue the harasser a written warning not to do it again. *Id.* The harasser and the victim were even left in the same working area. *Id.* at 103-104.

The *Paroline* court applied *Meritor's* rule that agency principles determine when an employer is liable for the acts of a supervisor. *Id.* at 106. Utilizing those principles, the court noted that liability could be imputed to

> an employer who anticipated . . . that the plaintiff would become a victim of sexual harassment in the workplace and yet failed to take action reasonably calculated to *prevent* such harassment. An employer's knowledge that a male worker has previously harassed female employees other than plaintiff will often prove highly relevant in deciding whether the employer should have anticipated that the plaintiff too would become a victim of the male

> employee's harassing conduct. *See Yates v. Avco Corp.*, 819 F.2d 630, 636 (6th Cir. 1987). . . .

Paroline, 879 F.2d at 107.[8]

Unlike Delta, the employer in *Paroline* was on notice of the harasser's proclivities before the plaintiff was hired (through harassment of other employees) and during her job interview (through inappropriate questions by the harasser), such that the Fourth Circuit ruled that a fact-finder should consider whether the employer could have prevented the harassment.

Paroline does not, therefore, deal with the factual situation that existed in this case, where conduct which was not foreseeable allegedly occurred and the employer took prompt, remedial action to end it. The prior, harassing conduct of which Delta was allegedly aware – the stock room kiss in 1980 or 1982 – was so different from the alleged conduct that led Ms. Reed to complain in 1991 (*i.e.*, a sexual assault), that Delta could not have anticipated that one would have led to the other. As the District Court stated:

> Delta cannot be held liable based upon notice given of a single incident occurring ten or eleven years prior to the notice upon which Delta took action when no other complaint had been made in the interim sufficient to give Delta notice of any offensive activity.

A16. The Sixth Circuit concurred. *Id.* at A28.

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[8] As the citation to *Yates* in the above-quoted excerpt makes clear, *Paroline* relied on the very Sixth Circuit line of authority Petitioner claims is in conflict with it. The *Yates* case was cited and discussed by both courts below (A10, A27), and is the cornerstone of *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178 (6th Cir.), *cert. denied*, 113 S.Ct. 831 (1992), also relied upon below.

Given that the court below and *Paroline* applied *Meritor*'s directive that agency principles determine employer liability for harassing acts of a supervisor (the difference in result being fact bound), there is no "conflict" between these two Circuits, and Petitioner's purported ground for certiorari does not exist.

The irony, of course, is that Ms. Reed's position is the one in actual conflict with *Meritor*. She argues that employers should be held strictly liable if their supervisors, unbeknownst to the employers, create sexually hostile work environments that injure subordinates, even if the alleged victim never complains. Brief of Petitioner, pp. 14-16. Such a rule is unacceptable under this Court's settled precedent. *See supra* note 7.

CONCLUSION

For the reasons set forth herein, this state law case is not a proper one for certiorari under Supreme Court Rule 10. But, even if it were, there is no conflict either between the court below and *Meritor* or the court below and *Paroline*. Instead, the decision below is in harmony with *Paroline*, and both courts properly applied *Meritor's* ruling that agency principles determine whether an employer is liable for the sexually harassing acts of its supervisor.

In applying those principles to the facts of this case, the court below properly found that Delta had no notice of any alleged sexually-hostile working environment created for Ms. Reed by Mr. Harris until she complained; and that when Ms. Reed finally did complain, Delta took immediate, appropriate remedial action to end it, thus

negating agency liability under the Tennessee Human Rights Act. Accordingly, the instant Petition for Writ of Certiorari should be DENIED.

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